

IP 06-0104-M 3 KPF US v Dominguez
Magistrate Kennard P. Foster

Signed on 7/12/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP-06-104M-03
ALBERTO DOMINGUEZ,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant, Alberto Dominguez, is charged in a complaint issued on March 22, 2006, with conspiracy to possess and distribute more than 500 grams of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Alberto Dominguez made his initial appearance in the Southern District of Indiana, on June 27, 2006. Prior to the initial appearance, the government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(B), (f)(1)(C) and (f)(2)(A), on the grounds that the defendant is charged with an offense for which the maximum sentence is a term of forty years' imprisonment, and there is probable cause to believe the maximum penalty is life imprisonment prescribed in the Controlled Substances Act; and the defendant is a serious risk of flight if released. The Court then scheduled a combined probable cause and pretrial detention hearing for June 30, 2006, upon request of the government for continuance of the hearing for three days, and the request of the

defendant for additional time to prepare for the hearing. At the combined probable cause and detention hearing held as scheduled, the United States appeared by Barry Glickman, Assistant United States Attorney. Mr. Alberto Dominguez appeared in person and by his appointed counsel, James C. McKinley.

The government stood upon its complaint and affidavit as to probable cause, and Task Force Officer Jerry Canon was offered for cross-examination. The Court found probable cause to believe the defendant committed the offense alleged in the complaint. The probable cause finding gives rise to the presumptions that there is no condition or combination of conditions which will reasonably assure the appearance of the defendant or the safety of the community. The defendant presented no evidence, and neither presumption was rebutted. It was established by clear and convincing evidence that the defendant is a serious risk of flight and a danger to the community and other persons, and consequently, he was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant, Dominguez, is charged by complaint with conspiracy to possess and distribute more than 500 grams of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

2. The statutory penalties for the drug trafficking conspiracy offense charged against the defendant, that is, conspiracy to possess and distribute more than 500 grams of cocaine, include a term of imprisonment of not less than five (5) years' imprisonment and up to forty (40) years' imprisonment; however, there is probable cause to find that the amount of cocaine may result in penalties of not less than ten (10) years' imprisonment and up to life imprisonment. 21 U.S.C. §§ 841(b)(1)(A)(viii).

3. The Court takes judicial notice of the complaint and affidavit submitted in this cause. The Court further incorporates the evidence admitted during the probable cause and detention hearing, as if set forth here.

4. Based upon the complaint and the testimony of Task Force Officer Canon, the Court finds there is probable cause for the offense the defendant is charged with committing and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. 18 U.S.C. § 3142(e).

5. The Court considered a Pre-Trial Services Report (PS3) regarding Alberto Dominguez on the issue of release or detention. Mr. Dominguez presented no evidence in rebuttal of the presumptions.

6. The PS3 evidences that the defendant is an alien who is illegally in the United States. Through the PS3 and testimony of Task Force Officer Canon, it was further established that Mr. Dominguez is a participant in illicit drug trafficking activity with a criminal street gang.

7. The evidence presented through the probable cause affidavit establishes that Mr. Dominguez and his co-defendants were in possession of approximately 500 grams of cocaine on or about March 14, 2006, while in the course of attempting to distribute some of that cocaine. This evidence, in conjunction with other evidence, is strong that the defendant did commit the offense charged, conspiracy to possess and distribute more than 500 grams of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

8. The presumption that the defendant is a serious flight risk and a danger to the community and any other person was not rebutted, and there is clear and convincing evidence that he is a serious flight risk and a danger to the community. Therefore, Alberto Dominguez is ORDERED DETAINED.

9. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to § 3142(f)(1)(B), (C), and (f)(2)(A), and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of

§ 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S. Ct. 148, 93 L. Ed. 2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n.20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L. Ed. 2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n.18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F. Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L. Ed. 2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n.7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

10. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble." *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

11. If Mr. Dominguez rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both

on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3d Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. As set forth above, and as contained in the complaint and affidavit and the evidence presented during the pretrial detention hearing, the evidence demonstrates a strong probability of conviction, the defendant having been arrested in conjunction with co-conspirators while in possession of approximately 500 grams of cocaine.

b. The mandatory minimum sentence of five (5) years, coupled with a maximum possible sentence of life imprisonment, establishes the defendant is a risk of flight. When accompanied with the fact that the defendant is an alien illegally in the United States, the unreasonable risk of flight is established by clear and convincing evidence.

c. The evidence indicating the defendant engaged in incipient criminal conduct, which is capable of continuing, establishes the danger to the community if the defendant were to be released. The danger to the community and other persons is further exacerbated by the fact that the defendant is acting in conjunction with members of criminal street gang engaged in distribution of controlled substances.

d. All of these facts considered, clearly and convincingly demonstrates there is no condition or combination of conditions which could reasonably assure the safety of the community or any other person or the appearance of the defendant as required.

The Court, having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that if the defendant had rebutted the presumptions in favor of detention, he nevertheless would be detained, because he is, by clear and convincing evidence, a serious risk of flight and a danger to the community.

WHEREFORE, Alberto Dominguez is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this ____ day of _____, 2006.

Kennard P. Foster
United States Magistrate Judge
United States District Court

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